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No. 07-1154

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SUPREME COURT, U.S.

In the
Supreme Court of the United States

STEPHEN DALE MCCLELLAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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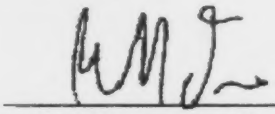
The petitioner disagrees with the government's assertion that he failed to preserve his Sixth Amendment objection to the application of the sentencing guidelines in the district court's alternative sentence of 121 months. While it is true the petitioner did not use the phrase "as applied" in the Court of Appeals, it is likewise correct that he challenged the manner in which the advisory guidelines were applied to him in the alternative amended judgment. The petitioner did this in two ways.

First, petitioner argued that under then-prevailing Fourth Circuit precedent, "a guidelines sentence containing judge-based sentencing enhancements is unconstitutional." Petitioner cited holdings from *United States v. Johnson*, 445 F.3d 339, 344 (4th Cir. 2006), *United States v. Moreland*, 437 F. 3d 424, 434 (4th Cir.), *cert. denied* 126 S. Ct. 2054 (2006), *United States v. Perez-Pena*, 453 F.3d 236 (4th Cir.), *cert. denied*, 127 S. Ct. 542 (2006), and *United States v. Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) to illustrate the mandatory nature of advisory guidelines under then-existing precedent. Thus, petitioner did challenge the manner in which the advisory guidelines had been applied to him on Sixth Amendment grounds. He did so in the context of then-existing Fourth Circuit precedent. Pet. Reply App. 1-2.

Second, petitioner argued that the district court's drug quantity determination violated his Sixth Amendment rights because the jury which convicted Mr. McClellan made no such finding. Pet. Reply App. 3-4. In short, petitioner's Sixth

Amendment claim, and his challenge to the guidelines, was presented to the Court of Appeals.

Respectfully submitted,



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ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THE LAW WHEN IT SENTENCED MCCLELLAN TO A TERM OF IMPRISONMENT BASED ON WHAT MCCLELLAN ADMITTED AT TRIAL.

a. The district court correctly determined it was limited to McClellan's testimony.

Under the Sixth Amendment, a defendant charged with conspiracy is entitled to a jury determination of the quantity of drugs attributable to him as an individual rather than the quantity for which the conspiracy as a whole was responsible. *United States* v. *Smith*, 441 F.3d 254, 273 (4th Cir. 2006). In McClellan's case, the jury found in a special verdict that the conspiracy involved at least 1.5 kilograms of methamphetamine, but that McClellan could not reasonably foresee that amount. *(Id.* at 14-15). No lesser quantity was submitted for the jury's consideration, and, thus, no specific quantity foreseeable to McClellan was found beyond a reasonable doubt.

At McClellan's first sentencing hearing, the district court concluded that McClellan could only be sentenced for the quantity of drugs to which he admitted involvement in his testimony during the trial because of the jury's special verdict, and because the amounts in the presentence report were not foreseeable to McClellan. *(Id.* at 80). At re-sentencing, the district court ruled that its original

sentencing analysis comported with *Booker*, and thereafter re-imposed the same sentence of 36 months imprisonment. *Id.* at 80-84, 90.

The government appeals the sentence on the ground that the district court's decision to limit its calculation of drug quantity to only what McClellan admitted conflicts with Fourth Circuit precedent and the mandate of the Court in *United States v. McClellan*, 182 Fed.Appx. 224 (4th Cir. 2006). McClellan disagrees. *Booker* holds that any fact other than the fact of a prior conviction which exposes a defendant to increased penalties must either be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt. Because there was no jury finding on drug quantity, the district court correctly ruled that it was constrained at sentencing by the drug quantity admitted by McClellan.

b. **The sentence was correct because the district court was precluded from making a drug amount finding of 50 grams or more of methamphetamine.**

In its Brief, the government urges this Court to adopt the district court's alternative sentencing judgment, based on the district court's finding by a preponderance of the evidence, that the offense involved at least 500 grams of methamphetamine. (Appellant's Brief, p. 6, 7, 10, 11). McClellan contends that the district court was precluded from making any determination on its own that the offense involved 50 grams or more of methamphetamine.

The Supreme Court "has repeatedly held that, under the Sixth Amendment, any fact that *exposes* a defendant to a greater potential sentence must be found by a

* * *

546. Finally, if the court imposes a "variance" sentence outside the Guidelines range, it must explain its reasons for doing so. *Id.* By requiring district courts to justify variance sentences outside the guidelines, the Fourth Circuit has created a burden of persuasion *in the district court* where the Supreme Court has now expressly stated there is none. For example, this Court has restricted district courts' sentencing discretion by limiting both departures and variances from the Sentencing Guidelines to situations in which "[the Guidelines] range does not accurately capture the particular circumstances of an individual defendant." *See United States* v. *Johnson,* 445 F.3d 339,344 (4th Cir. 2006). In *United States* v. *Moreland,* this Court held that "[t]he farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." 437 F.3d 424, 434 (4th Cir.), *cert. denied,* 126 S. Ct. 2054 (2006). In *United States* v. *Perez-Pena,* 453 F.3d 236 (4th Cir.), *cert. denied,* 127 S. Ct. 542 (2006), this Court made it clear that a sentence outside the Guidelines range was presumed to be unreasonable, holding that the district court could not sentence outside the Guideline range unless the defendant could demonstrate that he "was significantly more deserving of a lower sentence than the typical defendant whose illegal reentry crime has produced

the 37-46 month guideline range." *Id.* at 245. In *United States* v. *Hampton,* this Court held that, to withstand reasonableness scrutiny, the district court's justification for varying from the Guidelines sentence may not give "excessive weight" to any single sentencing factor. 441 F.3d 284, 288 (4th Cir. 2006). These holdings clearly indicate that the Fourth Circuit has given primacy to the sentencing guidelines above all other sentencing factors in §3553(a).

d. If the guidelines are mandatory, sentencing enhancements must be submitted to a jury and proved beyond a reasonable doubt.

Creating a sentencing system that places an extraordinary burden of proof on defendants and district court judges to justify non-guidelines sentences is functionally no different than the mandatory guidelines system proscribed by *Booker*. *Pre-Booker,* pursuant to 18 U.S.C. § 3553(b), a departure from the guidelines had to be justified by the existence of facts that made the case sufficiently atypical. *Booker* found §3553(b) unconstitutional and excised it from the statute, but current Fourth Circuit practice basically brings it right back. Defendants have a burden to establish why a non-guidelines sentence is appropriate, and district court judges must justify on the record why a sentence outside the guidelines is reasonable. This is virtually the same sentencing structure that was in place under the old §3553(b). Because of this, a guidelines sentence in the Fourth Circuit containing judge-based sentencing enhancements is

unconstitutional. Therefore, the district court did not err when it declined to follow the mandate of this Court's panel opinion. *See McClellan, supra.*